

The Appeals Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) Did claimant provide timely notice of accident?
- (3) Did the Administrative Law Judge err by issuing an award in this matter prior to the respondent being given an opportunity to submit its brief?
- (4) Should the conclusion of Mary Titterington's deposition taken on August 23, 2000, be included in the record?

Respondent also raises all issues raised before the Administrative Law Judge in its Application for Review, which include the following additional issues:

- (5) Did claimant prove that he suffered accidental injury arising out of and in the course of his employment with respondent?
- (6) Is claimant entitled to future and unauthorized medical as a result of this injury?

Respondent also disputed the average weekly wage finding of the Administrative Law Judge in its appeal. However, in its brief to the Board, respondent acknowledged that it had no quarrel with the average weekly wage found by the Administrative Law Judge in the amount of \$633.73. The Appeals Board, therefore, affirms the Administrative Law Judge's finding of claimant's \$633.73 average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Appeals Board finds that the Award of the Administrative Law Judge should be modified.

Claimant began working for respondent in 1995 as an off-road tire fixer. Claimant's duties required that he travel to different locations and fix tires on tractors, graders and other pieces of equipment. Claimant's job required that he lift heavy weights on a regular basis, with the tires weighing anywhere from 75 up to 200 pounds. Tractor tires would be even larger than that, but claimant was provided a hoist to help with the tires he was unable to handle. Claimant testified that he occasionally suffered back problems as a result of the heavy physical labor required in this job. The fact that this was a heavy physical labor job was confirmed by several respondent employees, including respondent's

store manager, Billy Joe (Red) Everhart, the office and credit manager, David Lee Lancaster, the service manager, Robert W. Meyer, and the assistant manager, Jerry Shelman.

Claimant first experienced low back problems in February of 1996. He went to a Dr. Douglas Boehr, a chiropractor, for an adjustment. Claimant saw Dr. Boehr again on May 8, 1996, in November 1996 and again in May 1997. With the exception of the May 1997 visits, claimant's back always improved after the adjustments by Dr. Boehr.

After receiving two treatments in May of 1997 and showing no improvement, claimant went to see Mark Newth, D.O., a family practitioner. Dr. Newth first saw claimant on September 20, 1995, as a new patient. The first time Dr. Newth examined claimant for low back symptoms was on February 3, 1997. He was advised at that time that claimant was a tire changer for respondent. He ordered x-rays, diagnosing lumbar arthritis and bilateral L5 spondylolysis and grade I spondylolisthesis at L5 and S1. Claimant was again seen in Dr. Newth's office for his low back on May 21, 1997, at which time claimant had low back and neck pain and right leg numbness. When Dr. Newth examined claimant on June 27, 1997, he continued to complain of low back pain. Claimant advised Dr. Newth he had obtained chiropractic adjustments in the interim, but that they did not help. Claimant again discussed the fact that his job required heavy lifting. Dr. Newth last saw claimant on August 5, 1997, with his ultimate diagnosis being a herniated disc at L4-L5 on the right and a central disc at L1-2. The herniation diagnosis was in addition to the spondylolysis and spondylolisthesis diagnoses earlier discussed. On July 21, 1997, claimant contacted Dr. Newth's office by telephone, discussing his increased back symptoms. Due to the increase in pain, Dr. Newth recommended claimant not work until he saw John Ebeling, M.D. An appointment was scheduled for August 14, 1997. Claimant was provided stronger pain medication including Relafen and Flexeril. Due to the significant pain he was experiencing, claimant underwent an epidural injection on July 30, 1997.

Claimant's last day of work with respondent was July 24, 1997. Claimant had driven to Wamego, Kansas, to repair a tractor tire on that date. He replaced the tractor tire, but experienced significantly more difficulties with his back while performing the job. Claimant testified, by the time he was finished replacing the big tractor tire, he was "done for".

Claimant returned to respondent's office where he contacted Billy Joe (Red) Everhart, respondent's store manager. Claimant's wife was already in the office with Red, discussing claimant's ongoing problems and her concerns for claimant's back pain. During the meeting, Mrs. Wright informed Red that claimant was having a lot of back difficulties and it was getting more and more severe. She inquired about whether they should file workers compensation, and was told that workers compensation would not work.

Red acknowledged he had a meeting with claimant and his wife on July 24, 1997. While he testified that neither claimant nor his wife attributed claimant's ongoing problems to work, as neither of them told him that claimant had been injured at work, he confirmed that claimant had had difficulties with his back for some time and that the work claimant was performing was very strenuous and heavy. He acknowledged that, in the six months prior to claimant's last day at work, they had had conversations about claimant's back and the fact that his leg was going numb. During those conversations, claimant advised that he would have problems during the week and, when he would go home on weekends and rest, things would be better by the following Monday morning.

Claimant's service manager, Robert W. Meyer, was also aware of claimant's ongoing back difficulties. Claimant had been advising him for approximately a year and a half prior to his deposition in March of 1998, that he was having difficulties. He was also aware that claimant left work on July 24, 1997, due to back problems and was scheduled for surgery. Claimant advised Mr. Meyer prior to his last day of work that the work that he was doing for respondent was contributing to his ongoing back problems. Mr. Meyer acknowledged that he became aware in early 1997 that the heavy work claimant was performing for respondent was contributing to claimant's ongoing problems and was making him worse. Despite these admissions, respondent continues to deny accidental injury arising out of and in the course of employment. However, respondent presents no lay or medical opinion refuting claimant's assertions.

Claimant was referred to K. N. Arjunan, M.D., a neurosurgeon in Topeka, Kansas, on August 1, 1997. Claimant had been admitted into the hospital by Dr. Newth, with Dr. Arjunan called in for a consultation.

Claimant underwent a period of bed rest, analgesics and muscle relaxers, and was placed on a short trial of steroids. He was discharged on August 5, 1997, from St. Francis Hospital, but readmitted about a week later with pain.

Claimant saw Dr. Arjunan in his office on August 18, 1997, and, after a physical examination, Dr. Arjunan suggested a myelogram and post-myelogram CT scan of the lumbar spine. An MRI performed on claimant revealed a disc herniation at L4-5, with some bulging at L1-2 and L2-3, and spinal stenosis at L2 and L3. There was also evidence of preexisting degeneration in the L1-2, L2-3 and L4-5 regions.

On August 21, 1997, claimant underwent an excision of the far lateral disc at L4-5. The surgery provided relief from the sharp pain radiating down into claimant's right lower extremity, but he still had range of motion restrictions in the lumbar spine. He also experienced occasional dysesthetic symptoms in the right lower extremity. Dr. Arjunan released claimant from his care with a 10 percent impairment to the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He

restricted claimant from lifting more than 45 pounds for a period of at least three months. After the three-month period, he no longer placed any weight restrictions upon claimant.

Claimant was undergoing rehabilitation and exercising. Dr. Arjunan felt that it would be better for claimant to rely upon the recommendations of the rehabilitation therapists, based upon how well claimant was doing with their program, rather than placing weight restrictions upon him by the neurosurgeon. By February 1998, he felt claimant was at maximum medical improvement.

Claimant was referred to Daniel D. Zimmerman, M.D., a medical doctor in Westwood, Kansas, by claimant's attorney. Dr. Zimmerman is a board certified independent medical evaluator, who works primarily for claimants. He examined claimant on December 29, 1998, at which time he diagnosed post-lumbosacral surgery, with degenerative disc disease and significant disc space narrowing in the lumbar spine. Dr. Zimmerman did not see any findings consistent with spondylolisthesis. He opined claimant's work with respondent permanently aggravated claimant's preexisting back condition.

Dr. Zimmerman recommended claimant restrict his lifting to 20 pounds occasionally and 10 pounds frequently, and avoid flexing the lumbar spine, as well as bending, stooping, squatting, crawling and kneeling activities. He further recommended that claimant be seated no more than 30 minutes at a time before he would need to change positions or move about. He also recommended claimant get off his feet every 30 to 45 minutes.

Dr. Zimmerman rated claimant at 18 percent impairment to the body as a whole based upon the AMA Guides, Fourth Edition.

Dr. Zimmerman later testified that the MRI from July 10, 1997, did indeed show a grade I spondylolisthesis at L5-S1. He was provided medical information showing the partial laminectomy and discectomy at L4-5 on the right side performed by Dr. Arjunan.

Dr. Zimmerman was provided a task list created by vocational expert Richard Santner. Dr. Zimmerman testified that, of the twenty-seven tasks on the list, claimant was unable to perform any of the tasks as a result of the injury suffered to his low back.

After surgery, claimant returned to work for respondent for approximately two months. Claimant worked from January 12, 1998, through March 1, 1998, at a comparable wage. However, claimant was physically unable to perform the work due to the heavy nature of the work required in respondent's employment. This was the first time claimant had worked since leaving respondent on July 24, 1997.

After leaving respondent a second time, claimant began working for Wal-Mart on March 2, 1998. Claimant was earning \$295.01 per week and continued this job through April 14, 1998. On April 15, 1998, claimant began a period of self-employment. As noted by the Administrative Law Judge, there is no wage information contained in the record for this period of self-employment.

On July 13, 1998, claimant obtained a job with Neenan Company as a warehouseman/truck driver. Claimant started at \$8 per hour and was provided a bonus, insurance and occasional overtime. On June 30, 1999, claimant's hourly rate was increased to \$9.75 an hour with a continuation of the bonus, overtime and insurance package.

During the period when claimant was earning \$8 an hour, his base wage would have been \$320 per week, with an additional \$14.34 from the \$350 bonus paid in 1998. Claimant also was provided an insurance package with a value of \$146.35 per month, which computes to \$33.77 per week. Finally, Mr. Neenan represented that claimant would have earned approximately \$1,000 in overtime during the period of time he was working for them. This computes to \$11.90 per week in overtime.

Claimant's average weekly wage through June 29, 1999, therefore, would be \$380.01 per week which, when compared to the \$633.73 average weekly wage agreed to by the parties, represents a 40 percent wage loss.

As of June 30, 1999, claimant's hourly rate increased to \$9.75 and his base rate increased to \$390 per week. His 1999 bonus of \$1,950.02 represents \$37.50 per week on the average. Claimant's overtime again was \$11.90 per week, with his insurance increasing to \$153.99 per month. This computes to a weekly insurance benefit of \$36.87. Claimant, therefore, had an average weekly wage of \$476.27 at that time which, when compared to the \$633.73 average weekly wage on the date of accident, represents a 25 percent loss of wages.

Regular hearing in this matter was held on January 13, 2000. Terminal dates were set at that time. Additional extensions of terminal dates were requested by the parties, with respondent's last terminal date ultimately being scheduled as of July 24, 2000. Respondent requested no additional extensions from that date. The Administrative Law Judge issued his decision on August 22, 2000, approximately 29 days after respondent's terminal date had run.

Respondent contends that it was denied due process due to the Administrative Law Judge issuing his Award prior to respondent being allowed the right to submit a brief. Respondent further contests the record, alleging that the deposition of Mary Titterington, respondent's vocational expert, was not concluded until August 23, 2000, the day after the Award was issued. However, the Board finds that, as respondent made no additional

requests for extension of terminal dates after July 24, 2000, the deposition conclusion of Mary Titterington dated August 23, 2000, should not be considered.

Respondent contends in its brief that the Administrative Law Judge erred in denying respondent the opportunity to submit legal and factual arguments in its brief. The Board finds that, while respondent does have the legal right to submit argument, it had more than ample opportunity to submit that argument. If respondent intended to provide additional evidence, specifically the conclusion of the Mary Titterington deposition, respondent could have requested an additional extension of time to submit that evidence. Respondent did not do so. Additionally, the Administrative Law Judge shall not stay a decision due to the absence of a submission letter. K.A.R. 51-3-5.

Respondent argues that Mary Titterington, in considering the restrictions of Dr. Zimmerman, assessed claimant an 83.72 percent loss of task performing abilities. In considering the restrictions of Dr. Arjunan, Ms. Titterington opined claimant had a 53.62 percent loss of task performing abilities. Neither Dr. Zimmerman, Dr. Newth nor Dr. Arjunan reviewed Ms. Titterington's task list with regard to what, if any, task loss claimant may have suffered from the injuries occurring while employed with respondent.

K.S.A. 1997 Supp. 44-510e makes is abundantly clear that any task loss opinion must be "in the opinion of the physician." Respondent's attempt to argue a task loss opinion based upon the opinion of Mary Titterington is in direct conflict with K.S.A. 1997 Supp. 44-510e.

In workers compensation litigation, the burden of proof is on claimant to establish his right to an award of compensation by proving the various conditions upon which his right to recovery depends by a preponderance of the credible evidence. See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

In order for claimant to collect workers compensation benefits, he must suffer accidental injury arising out of and in the course of his employment with respondent.

The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

The evidence in this case overwhelmingly supports claimant's position that he suffered accidental injury arising out of and in the course of his employment with respondent. Claimant testified, and respondent's representatives acknowledged, that claimant's work required heavy physical labor and was aggravating claimant's ongoing back problems. The medical experts in this matter agree.

Additionally, claimant's testimony regarding the accident on July 24, 1997, is uncontradicted. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). The Board finds that claimant has satisfied his burden of proving that he suffered an accident arising out of and in the course of his employment with respondent. Respondent's appeal as to this issue is substantially without merit.

K.S.A. 44-520 (Furse 1993) requires that notice of an accidental injury be given to the respondent within 10 days after the date of accident.

Here, claimant testified, and respondent's representatives supported claimant's testimony, that claimant's ongoing back problems were discussed on several occasions. It was acknowledged by respondent's store manager, Red Everhart, that claimant was having ongoing back problems. Additionally, in the meeting on July 24, 1997, claimant's wife specifically asked Mr. Everhart whether workers compensation benefits would be appropriate. Finally, respondent's service manager, Robert W. Meyer, acknowledged that claimant had had ongoing back problems for some time and that he had been aware since early 1997 that the heavy work claimant was performing for respondent contributed to his ongoing back problems and was making him worse. The Appeals Board finds there is substantial evidence in the record to support claimant's contention that he provided timely notice to respondent of his ongoing difficulties. Respondent's appeal as to this issue borders on frivolous.

As a result of the above findings, the Appeals Board finds that claimant would be entitled to both unauthorized medical up to the statutory maximum and future medical upon application to and approval by the Director for the injuries suffered while working for respondent.

With regard to the nature and extent of claimant's injury and/or disability, the Appeals Board finds no reason to disturb the Award of the Administrative Law Judge. Both Dr. Zimmerman and Dr. Arjunan assessed claimant functional impairments based upon the

AMA Guides, Fourth Edition, as required by statute. The Administrative Law Judge found, and the Appeals Board agrees, that there is no justification for placing greater weight upon the opinion of one doctor over the other. The Board awards claimant a 14 percent impairment to the body as a whole for the injury suffered through July 24, 1997.

K.S.A. 1997 Supp. 44-510e(a) defines permanent partial disability as:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

The Appeals Board finds the only task loss opinion contained in the record which can be considered is that of Dr. Zimmerman. Claimant has a 100 percent loss of task performing abilities.

K.S.A. 1997 Supp. 44-510e obligates that the fact-finder then average claimant's task loss with the loss of actual wages. The Board must consider whether claimant made a good faith effort to obtain employment after his injury.

Claimant was off work for the period July 24, 1997, through January 11, 1998, undergoing surgery. He was paid temporary total disability compensation during this period of time. Claimant then attempted to return to work with respondent at a comparable wage from January 12, 1998, through March 1, 1998. Claimant was unable to perform the heavy manual labor required with respondent as a result of his ongoing back problems.

Claimant left respondent and immediately obtained employment with Wal-Mart on March 2, 1998. Claimant continued working at Wal-Mart for approximately six weeks through April 14, 1998. However, the work at Wal-Mart required that claimant climb in and out of vehicles on a regular basis and proved too much for claimant's post-surgery back. Claimant then attempted self-employment for approximately three months, from April 15, 1998, through July 12, 1998. Claimant then obtained employment with Neenan Company as a warehouseman/truck driver, earning \$8 per hour plus bonus, insurance and additional occasional overtime. Claimant continued with Neenan at the time of the regular hearing. However, his hourly rate had increased to \$9.75 per hour.

The Appeals Board finds that claimant has made a good faith effort to obtain employment, post injury, and, therefore, will use claimant's actual earnings in computing claimant's work disability. However, during the period April 15, 1998, through July 12, 1998, when claimant was self-employed, claimant provided no information regarding what,

if any, wages he earned. The Appeals Board will, therefore, impute, during that period, the wages claimant was earning with Neenan Company.

Therefore, for the period January 12, 1998, through March 1, 1998, claimant will receive his functional impairment of 14 percent, as he was earning a comparable wage with respondent.

For the period March 2, 1998, through April 14, 1998, while working at Wal-Mart, claimant suffered a 53 percent loss of wages. For the period April 15, 1998, through June 29, 1999, claimant was earning \$380.01 per week with Neenan and will, therefore, be shown a wage loss of 40 percent. Beginning June 30, 1999, with his hourly rate increase, claimant was earning \$476.27 per week, which results in a 25 percent loss of wages.

Claimant's work disability will be calculated as follows: For the period July 25, 1997, through January 11, 1998, claimant is entitled to 24.43 weeks temporary total disability compensation. For the 7-week period January 12, 1998, through March 1, 1998, claimant is entitled to a functional impairment of 14 percent.

For the 6.29-week period March 2, 1998, through April 14, 1998, claimant's 53 percent wage loss and 100 percent task loss will result in a 76.5 percent permanent partial disability to the body as a whole. For the period April 15, 1998, through June 29, 1999, claimant's 100 percent task loss averaged with her 40 percent wage loss results in a 70 percent work disability. For the period beginning June 30, 1999, claimant's 25 percent wage loss, when averaged with the 100 percent task loss, results in a 62.5 percent permanent partial disability to the body as a whole for the injuries suffered through July 24, 1997, while employed with respondent.

The Appeals Board finds that the Award of the Administrative Law Judge should be modified accordingly.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery, dated August 22, 2000, should be, and is hereby, modified, and an award is granted in favor of the claimant, Lawrence A. Wright, and against the respondent, GCR Truck Tire Center, and its insurance carrier, Insurance Company of the State of Pennsylvania, for an injury occurring through July 24, 1997.

Claimant is entitled to 24.43 weeks temporary total disability compensation at the rate of \$351 per week totaling \$8,574.93. Thereafter, claimant is entitled to 7 weeks

permanent partial disability compensation at the rate of \$351 per week totaling \$2,457.00, through March 1, 1998, for a 14 percent permanent partial disability on a functional basis. Thereafter, claimant is entitled to an additional 6.29 weeks permanent partial disability compensation at the rate of \$351 per week totaling \$2,207.79, through April 14, 1998, for a 76.5 percent permanent partial disability. Thereafter, claimant is entitled to an additional 63 weeks permanent partial disability compensation at the rate of \$351 per week totaling \$22,113.00, through June 29, 1999, for a 70 percent permanent partial disability. Thereinafter, beginning June 30, 1999, claimant is entitled to a 62.5 percent permanent partial disability resulting in an additional 177.19 weeks of permanent partial disability compensation at the rate of \$351 per week totaling \$62,193.69, for a total award of \$97,566.41.

As of October 8, 2001, claimant is entitled to 24.43 weeks temporary total disability compensation at the rate of \$351 per week totaling \$8,754.93, followed thereafter by 195.14 weeks permanent partial disability compensation at the rate of \$351 per week totaling \$68,494.14, for a total due and owing of \$77,069.07, which is ordered paid in one lump sum, minus any amounts previously paid.

Thereinafter, claimant is entitled to an additional 58.4 weeks permanent partial disability compensation payable at the rate of \$351 per week in the amount of \$20,497.34 until fully paid or until further order of the court.

Claimant is entitled to future medical care upon proper application to and approval by the Director.

Claimant is entitled unauthorized medical care up to the applicable statutory limits upon presentation of an itemized statement verifying same.

Pursuant to the applicable version of K.S.A. 44-536, the claimant's contract of employment with his counsel is hereby approved.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier as follows:

Gene Dolginoff Associates, LTD Daniel Zimmerman, M.D., Deposition	\$460.65
Christian Reporting Service Dick Santner Deposition	Unknown
Correll Reporting Service Motion Hearing Transcript	\$ 48.75

Hostetler & Associates, Inc. Preliminary Hearing Transcript	Unknown
Appino & Biggs Reporting Service	
David Lancaster Deposition	\$ 54.10
Robert W. Meyer Deposition	Unknown
Diane Wright Deposition	\$152.00
Billy Joe Everhart Deposition	\$122.50
Regular Hearing Transcript	\$331.75
Metropolitan Court Reporters	
K. N. Arjunan, M.D., Deposition	\$273.54
Joseph Neenan Deposition	\$152.50
Mary Titterington Deposition	\$257.40
Mark Newth, M.D., Deposition	\$417.17

IT IS SO ORDERED.

Dated this ____ day of October, 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director